United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-2069

To be argued by
STANLEY L. KANTOR

United States Court of Appeals
FOR THE SECOND CIRCUIT

DONALD WALLACE, et al., on behalf of themselves and all others similarly situated who have matters pending in the Criminal Term of the Supreme Court of the State of New York, Kings County,

Plaintiffs-Appellees,

against

MICHAEL KERN, OLIVER D. WILLIAMS, JACOB J. SCHWARTZWALD, individually and as Justices of the Supreme Court of the State of New York, Kings County and VINCENT D. DAMIANI, etc., et al.,

Defendants-Appellants.

THE UNITED STATES OF AMERICA ex rel.,
MICHAEL A. McLAUGHLIN, et al.,

Plaintiffs-Appellees,

against

THE PEOPLE OF THE STATE OF NEW YORK, THE PEOPLE OF THE CITY OF NEW YORK, THE CHIEF PRESIDING JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, et al.,

Defendants-Appellants.

MICHAEL A. McLAUGHLIN, et al.,

Plaintiffs-Appellees,

against

THE PEOPLE OF THE STATE OF NEW YORK, et al.,

Defendants-Appellants.

[On Appeal from the United States District Court for the Eastern District of New York]

REPLY BRIEF FOR STATE DEFENDANTS-APPELLANTS

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REPLY BRIEF FOR STATE DEFENDANTS-APPELLANTS

Preliminary Statement

Defendants-Appellants state judges, justices, and court personnel and the Kings County District Attorney submit this brief in reply to the brief of Plaintiffs-Appellees.

1. Comity

In *Gerstein* v. *Pugh,* —— U.S. ——, 43 U.S.L.W. 4320, 4232 n. 9 (February 18, 1975), the Supreme Court approved a District Court's holding that the principles of *Younger* v. *Harris,* 401 U.S. 37 (1971) would not bar an order requiring judicial probable cause hearings before detaining arrested persons. Plaintiffs suggest that the case which they have presented is analogous to *Gerstein,* not to *O'Shea* v. *Littleton,* 414 U.S. 488 (1974), and that the comity issue raised herein should be governed by the footnote in *Gerstein,* rather than the lengthy reasoning of *O'Shea,* set forth in Defendants' Main Brief, Point I.

Plaintiffs attempt to distinguish *O'Shea* v. *Littleton, supra,* by inaccurately portraying it as "a frontal, broad-scale attack on the entire criminal justice system in Cairo, Illinois" in which effective relief would have required a "wholesale federal takeover of Cairo's prosecutorial and judicial systems" (Plaintiffs' Brief at 62-63). Regardless of the challenge raised by the *O'Shea* plaintiffs in the lower courts, the *only* issue before the Supreme Court in *O'Shea* was injunctive relief against judicial officials charged with unconstitutional bail and sentencing practices. Thus, the posture of the claims in *O'Shea* is closely analogous to the case at bar and the dicta warning against federal interference with bail and sentencing practices is directly applicable to the case at bar.

The *O'Shea* Court specifically noted (414 U.S. at 493 n. 1) the Court of Appeals' suggestion that possible injunctive relief might include periodic reporting of aggregate data on bail and sentencing actions. *Sub nom. Littleton* v. *Berbling,* 468 F. 2d 389, 415 (8th Cir. 1972). It was with particular reference to the order suggested by the Court of Appeals, not to a federal takeover of the criminal justice system, that the Supreme Court warned against interruption of state proceedings to adjudicate assertions of non-

compliance, stating:

> "This seems to us nothing less than an ongoing federal audit of state criminal proceedings which would indirectly accomplish the kind of interference that *Younger* v. *Harris, supra,* and related cases sought to prevent.
>
> A federal court should not intervene to establish the basis for future intervention that would be so intrusive and unworkable. In concluding that injunctive relief would be available in this case because it would not interfere with prosecutions to be commenced under challenged statutes, the Court of Appeals misconceived the underlying basis for withholding federal equitable relief when the normal course of criminal proceedings in the state courts would otherwise be disrupted. The objection is to unwarranted anticipatory interference in the state criminal process by means of continuous or piecemeal interruptions of state proceedings by litigation in the federal courts . . ." 414 U.S. at 500.

Plaintiffs suggest that the relief granted by the District Court would entail no interruption of state proceedings to adjudicate claims of noncompliance, characterizing the relief as merely procedural and urging that a claim of noncompliance will arise only in the "rare" situation when a hearing or statement of reasons is denied. Such a suggestion is refuted by the very face of the order. The relief granted requires more than a hearing and statement of reasons. It also establishes preferences in form and substance and burdens of proof and persuasion. Thus, for example, a contempt proceeding may be brought by a pretrial detainee who alleges that the People failed to recommend the form of security; or if monetary bail was recommended, that the People failed to meet their burden of proving alternative conditions of security insufficient to assure his presence; or that the statement of reasons was inadequate. See

Defendants' Main Brief at 31-32. Plaintiffs' hopeful but unsupported assertion that the sufficiency of the hearings and statements should be challenged in state courts is of little moment to those who will have to defend themselves in federal court because the claims can be properly brought there.*

Because their case is so clearly similar to *O'Shea,* plaintiffs' reliance on *Gerstein* v. *Pugh, supra,* is misplaced. In *Gerstein,* the Supreme Court held that a person arrested and detained for trial is entitled to a judicial determination of probable cause. The Court limited its holding to the precise requirement of the Fourth Amendment, recognizing the desirability of flexibility and experimentation by the states in implementing the right. 43 U.S.L.W. at 4236-37. Unlike the relief granted by the District Court herein, the relief in *Gerstein* was thus limited to the declaration of a right, without specification of mandatory procedures to enforce the right. As defendants have previously demonstrated (Defendants' Main Brief, Point II), plaintiffs herein are already afforded the basic right which is analogous to that declared in *Gerstein,* that is, the right to be heard on bail at a meaningful time and in a meaningful manner. *Gerstein* also differs from the instant case in that it appears that there were no available state remedies there. 43 U.S.L.W. at 4231-32. See also 42 U.S.L.W. at 3550; 483 F. 2d 778, 780-81; 332 F. Supp. 1107, 1111-12. As previously shown, plaintiffs herein have available and effective state remedies. Defendants' Main Brief at 21, 36-37, 57-60.

2. Due Process Considerations

Plaintiffs have in effect argued that the state's compel-

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* Indeed it is odd that plaintiffs, in light of the present posture of the case at bar, make such an assertion at all. Certainly if comity would dictate plaintiffs' proceeding first in the state courts on claims of non-compliance, then *per force* the case did not belong in the federal forum in the first instance.

ling interest in assuring a defendant's appearance for trial must be subjected to a least drastic means test.* The importance of requiring a defendant's presence at trial and submission to sentence cannot be overstated; it is critical in our criminal justice system, a system that authorizes arrest *and* detention upon a showing of probable cause and without any adversary proceeding at all. All that is necessary is that a policeman initially and a disinterested magistrate ultimately make a determination based on apparently reliable evidence that would allow a prudent man to believe that the suspect had committed or was committing an offense. See *Gerstein* v. *Pugh*, —— U.S. —— 43 U.S.L.W. 4230 (February 18, 1975); *Beck* v. *Ohio*, 379 U.S. 89 (1964); *Henry* v. *United States*, 361 U.S. 98 (1959); *Brinegar* v. *United States*, 338 U.S. 160 (1949). An arrest is as much, if not more, a deprivation of liberty as a bail determination, granting or denying bail, and is equally based on "proba-

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* That the interest is a compelling one was recognized by the court below. It wrote, rejecting plaintiffs' equal protection argument and suspect classification argument (A. 400):

> "There is a compelling state interest in having defendants available when their cases are reached for trial. The admittedly large number of defendants who default and for whom bench warrants are issued furnish proof that some guarantee of the defendants' return is necessary."

The interest is so compelling that even in a civil case it overcomes first amendment rights and rights to travel. *Branzburg* v. *Hayes*, 408 U.S. 665 (1972); *Garland* v. *Torre*, 259 F. 2d 545 (2d Cir.) *cert. den.* 358 U.S. 910 (1958). Nor does the Constitution exempt any person within the jurisdiction of the court from attendance upon it and the giving of evidence, unless specifically exempted by the Constitution. *United States* v. *Nixon*, 418 U.S. 683 (1974) (subpoena addressed to President of United States in a criminal trial); *Gravel* v. *United States*, 408 U.S. 606, 614 (1972) (Congressman subject to subpoena in civil cases and *arrest* in criminal cases).

The District Court's finding that wealth is a suspect classification mandating the compelling state interest test is at best questionable. See *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973).

bilities".* Yet plaintiffs argue that they are entitled to more procedural protections at a bail determination than the Supreme Court has held necessary for a probable cause determination to detain.

Plaintiffs appear to argue that a bail determination must be surrounded by procedural determinations akin to the remaining criminal proceedings or those mandated in a variety of administrative determinations some of which also involve liberty issues,** upon two grounds: first it imposes a significant restraint on liberty; and second it has "drastic" collateral consequences, both immediate and inherent in the system, as well as long term. It is conceded that pretrial detention is an impairment of liberty, but as this Court noted in *Rhem* v. *Malcolm*, 507 F. 2d 333 (1974), the impairment of liberties complained of inhere in the confinement itself; the withdrawal of liberties is "necessary to assure appearance at trial and security of the jail." 507 F. 2d at 336.***

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* Indeed, it is urged to this Court that one arrested and detained upon probable cause thereby loses his right to liberty and that the *restoration* of liberty pending trial is conditioned upon the accused's giving an amount reasonably calculated to adequately assure his presence at proceedings, and if convicted, submission to punishment. *Stack* v. *Boyle*, 342 U.S. 1 (1952). In *Gerstein*, as in the instant case, the action was addressed to those in pre-trial "custody" and excluded those "release[d] on recognizance". 43 U.S.L.W. at 4232 n. 11, 4236.

** A suggestion rejected by the Court in *Gerstein*, 43 U.S.L.W. at 4237 n. 27.

*** Indeed, appellants are at a loss to understand how the regimen at the Tombs for pre-trial detainees, and its relative constitutionality, bear on how a determination to set bail should be made. There, as in *Brennamen* v. *Madigan*, 343 F. Supp. 128 (N.D. Cal. 1972); *Jones* v. *Wittenberg*, 330 F. Supp. 707 (N.D. Ohio, 1971); and *Hamilton* v. *Love*, 328 F. Supp. 1182 (E.D. Ark. 1971), the Courts concerned themselves with the conditions under which pretrial detainees are housed and all assume that defendants are incarcerated. None of these cases, although relied upon by plaintiffs

(*footnote continued on following page*)

In *Gerstein,* the Court, in limiting itself to deprivations of liberty in a significant manner and for a substantial period, stated (43 U.S.L.W. at 4233-4234):

> "The conseqeunces of prolonged detention may be more serious than the interference occasioned by an arrest. *Pretrial confinement* may imperil the suspect's job, interrupt his source of income and impair his family relationships. . . . when the stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty." (Emphasis supplied.)

In rejecting the demand for the "full panoply of adversary safeguards", the Court recognized that pretrial custody may affect the defendants' ability to assist in defense preparation. However the Court held, in this regard:

> "[T]his does not present the high probability of substantial harm identified in [*United States* v.] *Wade,* [388 U.S. 218 (1966)]; and *Coleman* [v. *Alabama,* 399 U.S. 1 (1970)]."*

(*footnote continued from preceding page*)

(Plaintiffs' Brief at 24, 39, 50, 51), concern the means whereby the decision is made. If conditions at the city jails are such as to violate the provisions of the due process clause, ample remedies exist. They are not however in issue here, not part of the decision below and certainly not raised by appellants on this appeal. To the extent they were raised (Para. 5 of the Order, A. 428), such appeal concerned conditions at the courthouse not the jail and has, in any event, been withdrawn by defendants.

* Plaintiffs argue that the ability of counsel to argue effectively for bail was a factor in the Supreme Court's decision in *Coleman* v. *Alabama, supra,* holding that the Alabama preliminary hearing was a "critical stage" of the State's criminal process. In *Gerstein,* the Court clearly retreats from this implication, distinguishing *Coleman* solely because the hearing there was to determine whether the evidence justified charging the suspect and because the hearing provided for confrontation and cross-examination, necessitating the hand of counsel to explore or preserve the suspect's defense. *Gerstein,* 43 U.S.L.W. at 4236.

It can thus be seen that even if the case was properly before the District Court in the first instance, it was clear error for the Court to engraft procedural hearings on to the bail determination, and certainly to require those procedures only when financial conditions of security are involved.

Plaintiffs also assert that because the bail hearing is not held at arraignment and because substantial numbers of defendants would already be released on recognizance or realize that their roots in the community were such as to eliminate any chance of reduction, the burden on the courts is not as great as defendants make it out to be. To be sure, a substantial number of defendants are released, but to infer from that that the hearing requirement would not exacerbate pretrial delays fails to take cognizance of the repetitive nature of the applications made, and the judicially noticeable fact that many prisoners do not bring to bear the restraint appellants would have this Court ascribe to them. See, e.g., Friendly, *"Is Innocence Irrelevant? Collateral Attack on Criminal Judgments,"* 38 U.CHI.L.REV. 142 (1971).* To say that the Kings County courts, Kings County being the most populous in the State, are not busy ones and to ascribe such objective consideration of issues to pretrial detainees is to engage in speculation which statistics and experience prove inaccurate.

Finally, defendants reemphasize the Court's language in *Gerstein,* holding only that judicial probable cause

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* In that article Judge Friendy, then Chief Judge of this Court, takes umbrage at the blossoming caseload of collateral attacks on state criminal judgments that innundate the federal courts. Citing 1969 statistics, 7,359 petitions were filed in the district courts nationwide and over 12,294 prisoner suits were filed in the courts, comprising the largest single element in the civil caseload. *Id.* at 142-144. This load is spread over 93 district courts, 28 U.S.C. §§ 81-131, consisting of 537 district judges. 383 F. Supp. vii-xxi.

hearings were required to detain arrested persons:

> "Although we conclude that the Constitution does not require an adversary determination of probable cause, we recognize that state systems of criminal procedure vary widely. There is no single preferred pretrial procedure, and the nature of the probable cause determination usually will be shaped to accord with a State's pretrial procedure viewed as a whole. While we limit our holding to the precise requirement of the Fourth Amendment, we recognize the desirability of flexibility and experimentation by the States." 43 U.S.L.W. at 4236.

3. Habeas Corpus

Plaintiffs herein describe themselves as pretrial detainees whose incarceration allegedly results from unconstitutional bail practices. This action is a challenge to the very bail practices which result in their detention. Plaintiffs' own witnesses testified that the reformed procedures sought are intended to result in the release of more pretrial detainees. Nonetheless, plaintiffs express amazement at the assertion that they are challenging the fact of their detention.

Wolff v. *McDonnell*, 418 U.S. 539 (1974) does not stand for the blanket proposition that challenges to procedures which may affect custody are distinguishable from challenges to confinement itself, and cognizable under 42 U.S.C. § 1983. The very passages from *Wolff* which plaintiffs cite elucidate the holding of that case. Because that the *Wolff* plaintiffs could properly seek money damages in a § 1983 action, even though they could not obtain restoration of their good time credits, the Court recognized that a determination of the validity of the procedures which resulted in the alleged damage was necessary:

> "Such a declaratory judgment as a predicate to a damages award would not be barred by *Preiser;* and

> because under that case, only an injunction restoring good time improperly taken is foreclosed, neither would it prevent a litigant from obtaining *by way of ancillary relief* an otherwise proper injunction enjoining the prospective enforcement of invalid prison regulations. *Id.* at 555." (emphasis supplied).

Wolff, then, stands only for the proposition that declaratory or injunctive relief against state procedures may be granted if a determination of their constitutionality is necessary to decide a proper claim for money damages.* The declaratory or injunctive relief is ancillary to the damages award and arises only because there is a claim for damages. Plaintiffs herein never sought money damages and any such claim would have been dismissed as frivolous since all of the defendants are immune from liability in a § 1983 action. E.g. *Pierson* v. *Ray*, 386 U.S. 547 (1967); *Fanale* v. *Sheehy*, 385 F. 2d 866 (2d Cir. 1962). The absence of a proper claim for monetary relief is fatal to plaintiffs' reliance on *Wolff* since there is nothing else to which declaratory or injunctive relief could be ancillary.

Nor does *Gerstein* v. *Pugh*, 43 U.S.L.W. at 4231 n. 6, buttress plaintiffs' argument. The Court there stated that plaintiffs did not seek or obtain release from custody and thus did not fall within the purview of *Preiser*. The *Preiser* issue was not briefed by the parties in *Gerstein;* it was not even raised until oral argument. 42 U.S.L.W.

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* The rationale for this rule is based on the principles of comity set forth by the Court in *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973). If an inmate could obtain declaratory or injunctive relief in the federal court at the same time he was pursuing state court relief for restoration of his good time credits, the federal order would be *res judicata* in the state action. As a result, if inmates obtained speedier decisions in the federal courts, the state courts would effectively be precluded from having the first opportunity to consider the merits of the claims. Hence the requirement that a valid claim for money damages be presented before the federal court will grant declaratory or injunctive relief.

at 3550.* It is submitted that the Supreme Court did not intend by this footnote to overrule *Preiser* or modify the reasoning of *Wolff;* the holding is *sui generis.* Cf. *Sosna* v. *State of Iowa,* —— U.S. ——, 43 U.S.L.W. 4125, 4132 (January 14, 1975) (WHITE, J., dissenting).

Moreover, with regard to the *habeas corpus* issue, *Gerstein* is distinguishable from the case at bar. The *Gerstein* plaintiffs never contended that there was no probable cause on which to base their detention. Their incarceration resulted from a probable cause determination by an arresting officer, grand jury, or prosecutor. The relief sought was review or redeterminatoin of probable cause by a judicial official. Plaintiffs herein however, claim that erroneous decisions are made in the first instance because of allegedly unconstitutional practices which result in the unnecessary denial of bail or setting of monetary bail. Secondly, the *Gerstein* plaintiffs never suggested or sought to prove that the procedure which they sought would or should result in the release of most of them. Exactly the opposite is true in the instant case. Defendants' Main Brief at 52-55.

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* Since the *Gerstein* plaintiffs were apparently without available state remedies (*ante* at 4), the decision to allow them to proceed by way of a § 1983 action was not major; had they proceeded by habeas corpus after proving the dearth or futility of state remedies, it would have been essentially the same lawsuit as a § 1983 action.

CONCLUSION

For the above-stated additional reasons, the decision below should be reversed and the order, insofar as appealed from, be vacated.

Dated: New York, New York, May 21, 1975.

Respectfully submitted,

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